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BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

COASTAL TRAILER REPAIRS, INC.
/LONE STAR NORTHWEST, INC.

Appellants,

v.

PUGET SOUND AIR POLLUTION CONTROL
AGENCY,

Respondent.

PCHB Nos. 92-5 and 92-7

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter came on for hearing on May 28, 1992, in Lacey, Washington, before the Pollution Control Hearings Board with John H. Buckwalter, Administrative Law Judge, presiding and Board member Harold S. Zimmerman, Chairman in attendance. Board member Annette McGee reviewed the record.

At issue were two alleged dust emission violations carrying penalties of \$1,000 each charged by the Puget Sound Air Pollution Control Authority (PSAPCA, hereinafter) against Coastal Trailer Repairs, Inc. (Coastal, hereinafter) and Lone Star Northwest, Inc. (Lone Star, hereinafter).

Appearances were:

Dennis L. Means, pro se, for appellant Coastal.

James E. Fearn, Jr., attorney, for appellant Lone Star.

Keith D. McGoffin, attorney, for respondent PSAPCA.

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1 Proceedings were recorded by Betty J. Koharski of Gene Barker
2 Associates and were also taped. Witnesses were sworn and testified,
3 exhibits were examined, and arguments of the parties were heard. From
4 these, the Board makes these

5 FINDINGS OF FACT

6 I

7 The site of the matter under consideration is located at 5906
8 West Marginal Way Southwest in the City of Seattle, King County,
9 Washington State, and is and was owned by Lone Star at the time of the
10 incidents under consideration here.

11 In June, 1990, Lone Star executed a lease with Coastal which then
12 used the site for the handling, storage, and repair of trucks and
13 related equipment.

14 II

15 In a letter dated November 9, 1990, in reply to a dust emission
16 violation which had been charged by PSAPCA, Coastal committed itself
17 to taking certain corrective action to prevent further violations. In
18 general terms they were:

19 Laying clean 1 1/4 inch crushed gravel on all traveled aisle ways
20 inside the facility - to be initiated immediately.

21 Lay a 40 foot wide concrete driveway through the facility from
22 entry gate to exit gate to be used by all traffic
23 entering/leaving the facility - to be completed by the
24 end of March, 1991.

1 Fully concrete the entire facility - over a three year period.

2 III

3 On September 6, 1991, at approximately 3:15 p.m., a PSAPCA Air
4 Pollution Control Inspector, Thomas J. Hudson, while driving on West
5 Marginal Way S.W. observed a dust plume in the direction of the site.
6 He drove to the north side of the site and observed vehicular traffic
7 on the unpaved roadways within the site causing fugitive dust to be
8 emitted into the air.

9 IV

10 After taking three photographs of the activity, he entered the
11 site and walked around it with the Coastal assistant manager during
12 which he observed that the interior roadways and container storage
13 areas were covered by a dry and extremely fine layer of gray/white
14 material. The interior roads and storage areas had not been paved as
15 promised in Coastal's November 9, 1990, letter cited above. The
16 Inspector then took three more photographs of fugitive dust emissions
17 caused by vehicular traffic within the site.

18 V

19 The Inspector prepared Notice of Violation No. 27447 which was
20 served on both Coastal and Lone Star on September 12, 1991, citing
21 them for violations of PSAPCA Regulation I, Sections 9.15(a) and (d).

22 The PSAPCA Notice of Violation Form has a section titled
23 Corrective Action Notice which requires, among others, that the
24

1 alleged violator "take the following necessary corrective action."
2 There was no notation on this notice, nor did the Inspector have any
3 recollection of "corrective action" being discussed on his September
4 6th visit.

5 VI

6 On September 16, 1991, at approximately 3:30 p.m., Inspector
7 Hudson revisited the site area and observed a truck leaving Coastal's
8 facility with dirt on its wheels which was deposited onto West
9 Marginal Way S.W. as the truck drove over it. The Inspector also saw
10 fugitive dust emissions coming from Coastal's interior yard. The
11 Inspector, accompanied by Coastal's facility manager, Mark Navarre,
12 inspected the facility site and again observed that the surface was
13 covered with a fine, dry material, gray/white in color. The Inspector
14 informed Mr. Navarre that another Notice of Violation would be issued
15 and instructed him to maintain the interior yard in a wet condition to
16 prevent further fugitive dust emissions and to clean the exit apron as
17 often as possible.

18 VII

19 The Inspector's Notice of Violation No. 27450, dated September
20 16, 1991, citing violations of PSAPCA's Regulation I, Sections 9.15(a)
21 and (b) was served on both Coastal and Lone Star.

22 Under its Corrective Action Notice section, this Notice of
23 Violation required that Coastal "Keep vehicular operation areas wet at
24 all times" and "Clean paved areas (i.e. streets) as necessary".
25

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VIII

By letter to Coastal, dated September 20, 1991, Lone Star disclaimed any responsibility for the September 6, 1991 violations cited in PSAPCA Notice 27447, asserted that they were violations of Coastal's obligations to perform certain covenants under their lease, required Coastal to take immediate corrective action to comply with the applicable law, and offered to renegotiate the lease to allow Coastal to make necessary improvements to the property at Coastal's expense.

IX

By a later but undated letter following receipt of Notice 27450, Lone Star notified Coastal that the 30 day period allowed by the lease for "curing" the lease violations had not been met and that, if not cured within ten days of receipt of the (undated) letter, Lone Star would be entitled to bring an unlawful detainer action for eviction of Coastal from the property.

Subsequently, the lease was terminated by the parties, and Coastal vacated the property on or before November 30, 1991.

X

On November 15, 1991, two Notice and Order of Civil Penalty documents were issued by PSAPCA and served on Coastal and Lone Star on November 18, 1991, No's. 7496 and 7497, alleging violations of PSAPCA Regulation I and imposing a civil penalty of \$1,000 for each Notice, a total of \$2,000.

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1 Coastal and Lone Star each submitted an application for relief to
2 PSAPCA which denied both applications. Both submitted timely appeals
3 to the Pollution Control Board, numbered respectively PCHB 92-5 and
4 92-7, which were subsequently consolidated for hearing.

5 XI

6 Any Conclusion of Law deemed to be a Finding of Fact is hereby
7 adopted as such. From these Findings of Fact the Board makes these

8 CONCLUSIONS OF LAW

9 I

10 This Board has jurisdiction over the parties and subject matter
11 of this action. RCW 43.21B.110. Because this concerns the imposition
12 of a penalty, respondent PSAPCA has the burden of proof.

13 II

14 Notice and Order of Civil Penalty 7496 charged violation of
15 PSAPCA Regulation I, Sections (a) and (d), specifically describing the
16 violations as:

17 Caused or allowed the emission of fugitive dust without
18 using best available control technology; and in sufficient
19 quantities and duration as is likely to be injurious to
human health at 5906 W. Marginal Way SW in Seattle,
Washington.

20 Neither of the appellant parties contested that the cited dust
21 emissions actually occurred nor that the quantities were sufficient to
22 be injurious to human health.
23

1 III

2 Notice and Order of Civil Penalty No. 7497 charged violation of
3 PSAPCA Regulation I, Sections 9.15 (a) and (b)(3), specifically
4 describing the violations as:

5 Caused or allowed the emission of fugitive dust without
6 using best available control technology; and caused or
7 allowed vehicles to drop deposits of mud and dirt from
8 wheels onto paved, public roadway when leaving 5906 W.
9 Marginal Way SW in Seattle, Washington.

10 Neither of the appellant parties contested that the cited dust
11 emissions actually occurred nor that there were deposits of mud and
12 dirt from the vehicle wheels onto Marginal Way.

13 IV

14 We need to consider one other aspect of the charged violation:
15 whether or not the best available control technology was being used by
16 the responsible party or parties.

17 V

18 The first Notice of Violation, No. 27447, carried no corrective
19 action requirement, while the second Notice, No. 27450, required only
20 that operational areas be kept wet at all times and that paved areas
21 be cleaned as necessary. There was testimony from Coastal that it
22 brought in 27,000 pounds of crushed gravel, a grader, and watering
23 trucks and acquired a street sweeper in order to meet the corrective
24 action requirements of the second Notice. However, there was
25 testimony from PSAPCA that those steps were considered only as interim

1 actions in the absence of the paved driveway which, in its letter of
2 November 9, 1990, Coastal had committed to have completed by the end
3 of March, 1991 along with the other promised improvements.

4 VI

5 Dennis L. Means, President of Coastal, testified that paving the
6 driveway and other areas was not practical because it would have
7 interfered with the passage of the two to three hundred trucks a day
8 which ordinarily came through the site and also would have created a
9 collection bowl for rain water which would then have run off into the
10 adjacent Duwamish waterway. The Board does not find these reasons
11 persuasive.

12 A business inconvenience cannot justify continuation of a
13 fugitive dust emission problem which can threaten the health of the
14 public. Furthermore, Coastal must have considered, or should have
15 considered, that such traffic interruption would occur when it made
16 its commitment in 1990.

17 Coastal produced no testimony to support its "bowl" theory and in
18 fact, Mr. Means testified that he never sought any expert opinion to
19 sustain it.

20 VII

21 The Board concludes that the violations, as charged on the two
22 Notices, did occur. The remaining issue is the assignment of
23 responsibility and liability to one or both of the appellants.

VIII

For the purpose of determining the liability of the parties, it is not necessary for the Board to repeat here in their entirety the texts of PSAPCA Regulation I, Sections (a), (b)(3), and (d). It is sufficient to note that all three start with "It shall be unlawful for any person to cause or allow ...".

We start our discussion by finding that, as to Coastal, PSAPCA has met its burden of proof and that the evidence is conclusive that Coastal through its operations at the site caused the emissions of fugitive dust as charged.

IX

Lone Star contends that, as the lessor under its lease with Coastal, it had no responsibility for the Coastal operations and therefore cannot be liable for the dust emissions caused by the Coastal operations. If the lease were the only determining factor, we would have no problem in reaching the same conclusion. However, the three Regulation I sections cited all assign responsibility not only to those who "cause" dust emissions but as well as to those who "allow" them.

X

Inspector Hudson testified that on both of his visits to the Coastal site, he found fine gray/white material covering the site surfaces. Mr. Ed Owens, Vice President of Lone Star, later testified

1 that Lone Star is a construction material operation including
2 supplying crushed gravel and concrete products to contractors, that
3 before the lease of the site to Coastal, Lone Star had used it for
4 parking its trucks and other equipment, and that for a short time the
5 site had been used by another company which crushed used concrete. He
6 further testified that the fine material on the site which the
7 Inspector had noted had been generated prior to the lease with
8 Coastal, that it was still on the site to some extent, and that
9 Coastal was not responsible for its presence on the site.

10 XI

11 The Board finds that Lone Star knew that the fine gray/white
12 residue was present but, nevertheless, leased the site to Coastal
13 which, by the nature of its business operations, obviously would be
14 "causing" the dust emissions. We conclude that, by taking no action
15 to correct what it very well could have prevented by cleaning up the
16 site before leasing it to Coastal, Lone Star "allowed" the violations
17 to occur and is liable as charged by PSAPCA.

18 XII

19 We find precedent for our conclusion in RCW 70.94.431(3)"

20 Each act of commission or omission which procures, aids,
21 or abets in the violation shall be considered a
22 violation...and subject to the same penalty.

23 And, in Ken Pearson Construction, Inc. v. PSAPCA, PCHB No. 88-186

24 (1989) at p. 5, we held that:

25 The Washington Clean Air Act is a strict liability
26 statute. Acts violating its implementing regulations

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1 are not excused on the basis of intent. Moreover, the duty
2 to comply cannot be delegated away by contract. (cites
3 omitted).

4 In the instant case, Lone Star's "omission", the failure to
5 remove the residue, procured and/or aided in the violations charged,
6 and the responsibility for the omission cannot be passed on to Coastal
7 by the terms of the lease.

8 The Board is not persuaded by cases cited by Lone Star in support
9 of its position where the violations therein were solely caused by
10 actions of the lessee after taking possession of the property. Here,
11 the causative condition existed with Lone Star's knowledge before
12 Coastal took possession of the site.

13 XIII

14 Both appellants ask for mitigation of the penalties because of
15 loss of money due to the early lease termination, Coastal because of
16 relocation costs and Lone Star because of lost rents. This Board
17 cannot find or conclude that money lost or expended because a person
18 violates a law or regulation is cause for mitigating a penalty which
19 was imposed because he committed the violation.

20 XIV

21 Coastal also asks for mitigation because of the money it expended
22 to correct the dust condition by buying gravel, a grader, a street
23 sweeper, and having water brought in to wet down the site.

The Board must balance these efforts against Coastal's unilateral decision not to perform the paving promised in its 1990 letter for its own unsupported reasons.

XV

Lone Star also asks for mitigation because it took early action to terminate the lease with Coastal after learning of the violations.

The Board must balance these efforts against Lone Star's failure to eliminate the dust problem before leasing the site to Coastal.

XVI

Because of Coastal's failure to take appropriate corrective action as it had promised, along with its continuing operation and violations even after having full knowledge that it was causing fugitive dust emissions, we conclude that Coastal bears a larger responsibility for the two citations than does Lone Star.

XVII

Any Finding of Fact which is deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

THAT PSAPCA's Notice and Order of Civil Penalty No's. 7496 and 7497 are both AFFIRMED as to both Coastal Trailer Repairs, Inc. and Lone Star Northwest, Inc. and

THAT Coastal Trailer, Repairs, Inc, is liable for \$1,500 of the total \$2,000 penalty without mitigation, and

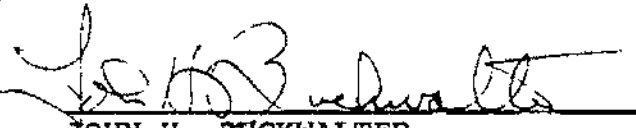
THAT Lone Star Northwest, Inc. is liable for \$500 of the total \$2,000 penalty with \$250 of that amount suspended on condition that it remove the gray/white residue from the site in accordance with a time schedule and in a manner approved by PSAPCA and, further, that Lone Star Northwest, Inc. has no further fugitive dust violation for two years from the date of this ORDER.

DONE this 25th day of June, 1992.

POLLUTION CONTROL HEARINGS BOARD


HAROLD S. ZIMMERMAN, Chairman


ANNETTE S. MCGEE, Member


JOHN H. BUCKWALTER
Administrative Law Judge
Presiding

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